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Nos. 00-1751, 1777, 1779

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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

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Petitioners,

v.

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SENEL TAYLOR, *et al.*,
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a program designed to rescue economically disadvantaged children from a failing public school system by providing scholarships that they may use in private, religious, or suburban public schools that choose to participate in the program—and which operates in the context of a broad array of public school choices—violate the First Amendment because in the early stages of the program most of the schools that have agreed to take on scholarship students are religiously affiliated?

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Ohio Rev. Code § 3313.60.5(B) 12
Ohio Rev. Code § 3321.03 21
Ohio Rev. Code §§ 3313.974-3313.983 2

CHURCH DOCUMENTS

Vatican Council II, *Dignitatis Humanae* (Declaration on Religious Freedom) (1965) 29

OTHER AUTHORITIES

Philip Bertocci, *Jules Simon* (1978) 16
Léon Bourgeois, *Solidarité* (1912) 17
Orestes Brownson, "Socialism and the Church" (1849), in Orestes Brownson, *Essays and Reviews* (1852) 15
Center for the Advancement of Ethics and Character, *Character Education Manifesto* (1996) ... 11
Character Counts! Coalition, *The Six Pillars of Character*, http://www.charactercounts.org/defsix.htm (2001) 9, 10, 20
Character Education Partnership, *Eleven Principles of Effective Character Education*, http://web541ba.ntx.net/principles/index.cgi (2001)... 10, 11
Pierre Teilhard de Chardin, "The Grand Option" (1939) in Norman Denny (Trans.), *The Future of Man* (1964) 28
D. G. Charlton, *France* (1972) 15, 16
Auguste Comte, The *Catechism of Positive Religion* (1858) 16
Christopher Dawson, *Religion and the Modern State* (1935) 28

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Eileen Dempsey, "Building Character," in *The Columbus Dispatch* (May 2, 2001) 10
Jay Greene, "Civic Values in Public and Private Schools," in Paul Peterson and Bryan Hassel, (eds.), *Learning from School Choice* (1998) 24
Georg Iggers, *The Doctrine of Saint-Simon: An Exposition, First Year*, 1828-1829 (1958) 15
Institute for Global Ethics, *Report from Wingspread* (1996) 12, 13
James Kelly, *Six Phases of Democratic Evolution* (2001) 17, 18
Gabriel Marcel, *Men Against Humanity* (1952) 29
Jacques Maritain, *Education at the Crossroads* (1943) 19
Joshua Mitchell, *The Fragility of Freedom* (1995) 20
Ohio Department of Education, *About Learn & Serve Ohio*, http://www.ohiok-16service.org.odeabout.htm (2001) 12
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Rotary International, *Rotary 4-Way Test*, http://www.rotary.org/aboutrotary/4way.html 2001) ..8, 9, 20

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Henri de Saint-Simon, "New Christianity" (1825), in Felix Markham (ed.), *Social Organization, the Science of Man and Other Writings* (1964) 14

Phyllis Stock-Morton, *Moral Education for a Secular Society* (1988) 16

Alexis de Tocqueville, *Democracy in America* (1968 ed.) 19

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BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS* *

Solidarity Center for Law and Justice, P.C. is a professional corporation organized under the laws of the State of

* Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of the brief.

Georgia for the promotion of social welfare by defending human and civil rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U. S. Constitution or by a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice, P.C. files briefs as *amicus curiae* in litigation of importance to the protection of human and civil rights, particularly when the primary right of parents to direct the upbringing of their children in accordance with the dictates of their consciences is at issue.

In examining the constitutionality of the Ohio Pilot Project Scholarship Program, Ohio Rev. Code §§ 3313.974-3313.983 (the "Program"), the United States Court of Appeals for the Sixth Circuit determined that private religious schools receiving scholarship aid under the Program "incorporate religious concepts, motives, and themes into all facets of their educational planning." *Simmons-Harris v. Zelman*, 234 F.3d 945, 960-961 (6th Cir. 2000). In addition to reversing the Sixth Circuit's decision that the Program is unconstitutional, this Court should remand this case to the applicable federal trial court for a determination as to whether, through the teaching of comprehensive character education and service learning programs, Ohio *public* schools are incorporating religious concepts, motives, and themes into all facets of *their* educational planning. If so, the lower trial court then should be required to determine whether the eligibility for and amount of the scholarship aid offered under the Program should be expanded in order to avoid the establishment of a civic religion in Ohio public schools.

Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

SUMMARY OF ARGUMENT

In examining the constitutionality of the Program, the Sixth Circuit determined that private religious schools receiving scholarship aid under the Program "incorporate religious concepts, motives, and themes into all facets of their educational planning." *Id.* In point of fact, through comprehensive character education and service learning programs, Ohio *public* schools incorporate religious concepts, motives, and themes into all facets of *their* educational planning.

This Court has determined that for purposes of the Free Speech Clause there is "no logical difference in kind between the invocation of Christianity" by an after-school youth club "and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Good News Club v. Milford Central School*, 533 U.S. ___, 121 S.Ct. 2093, 2102 (2001). The character virtues pervasively taught in Ohio public schools, including truthfulness, trustworthiness, respect, responsibility, fairness, caring, and citizenship, are more "quintessentially religious" in nature than are the virtues of teamwork, loyalty, or patriotism.

Facing a crisis of character among youth that is attributable in significant part to a decades-long absence of effective character formation within their schools, Ohio public school officials have embraced character education and service learning models similar to those for which private religious schools are renowned. Yet, Ohio parents who choose to educate their children at such private religious schools are denied equal access to public education funding due to the very existence of such moral education models.

By funding public school character education and service learning programs, the State of Ohio has created a limited

public forum for the expression of parent, student, and community viewpoints regarding the moral and social character of the ideal American citizen and worker. By failing to examine the religious nature of this limited public forum, the Sixth Circuit has implicitly endorsed a form of viewpoint discrimination in the funding of Ohio public education. Such discrimination results in the establishment of a state-sponsored civic religion by compelling children to subscribe to and participate in public school religious concepts, motives, and themes that conflict with the private and peaceful religious viewpoints of their parents.

The government may not establish "an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). Far from offering low-income families an "illusory" educational choice, the Program constitutes an important first step at creating a public school funding paradigm that will prevent Ohio school officials from coercing parents into having their children indoctrinated in a civic religion rather than the tenets of their chosen religious faiths.

This Court should uphold the constitutionality of the Program as an acceptable example of "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion." *Witters v. Washington Dep't. of Services for the Blind*, 474 U.S. 481, 490-91 (1986) (Powell, J., concurring). This case should be remanded to the applicable federal trial court for a determination as to whether the State of Ohio has created a public forum for the teaching of religious concepts, motives, and themes relating to the moral education of children. If so, the lower trial court then should determine whether the eligibility for and amount of the scholarships offered under the Program should be expanded in order to prevent impermissible viewpoint discrimination and the establishment of a civic religion in Ohio public schools.

ARGUMENT

I. OHIO PUBLIC SCHOOL CHARACTER EDUCATION AND SERVICE LEARNING PROGRAMS INDOCTRINATE CHILDREN IN RELIGIOUS CONCEPTS, MOTIVES, AND THEMES THAT ARE NO DIFFERENT IN KIND THAN THOSE TAUGHT IN PRIVATE RELIGIOUS SCHOOLS.

The Sixth Circuit determined that private religious schools receiving scholarship aid under the Program "incorporate religious concepts, motives, and themes into all facets of their educational planning." *Simmons-Harris*, 234 F.3d at 960-961. In making this determination upon which its entire decision rests, the Sixth Circuit emphasized sectarian school i) religious guidelines requiring that "all learning take place in an atmosphere of religious ideals;" ii) handbooks and mission statements reflecting "that most believe in interweaving religious beliefs with secular subjects;" and iii) educational scholarship designed to make "religious truths and values permeate the whole atmosphere of the school." *Id.* at 949.

In point of fact, the religious concepts, motives, and themes taught in Ohio's *public* school character education and service learning programs are no different in kind than those taught in private religious schools. Yet, the Sixth Circuit restricted its Establishment Clause analysis to the religious nature of the moral education provided in private schools, especially Christian ones.

A. Ohio Public Schools Teach Religious Concepts, Motives, and Themes That Are No Different in Kind Than Those Used as a Foundation for Moral Education in Private Religious Schools.

The Ohio Department of Education has developed and subscribes to the following definition of character education:

> Character education involves specific, targeted efforts to communicate and integrate into the lives of children and youth widely shared core character qualities (e.g., caring, citizenship, fairness, respect, responsibility, trustworthiness). A school and larger education community committed to character education explicitly names and publicly stands for specific core character qualities like these, shares the qualities among members of the school and community, defines them in terms of behaviors that can be observed, practices them, studies and discusses them, and honors them by holding all representatives of the school and community accountable to standards of conduct consistent with the qualities.

Ohio Partners in Character Education, *Character Education Resources*, http://www.charactereducationohio.org/resources.htm (2001).

Ohio Partners in Character Education ("OPCE") is a public-nonprofit-private initiative that pursues "a respectful and productive learning environment for Ohio students." OPCE creates, supports, and evaluates character education policies and practices in schools and communities; provides technical assistance to local agencies in the development and implementation of curriculum materials, teacher training, and other activities relating to character education; and encourages local school communities to integrate character education into their programming and curricula. Ohio Partners in Character Education, *About OPCE*, http://www.charactereducationohio.org/about.htm (2001).

OPCE is comprised of three types of partners: the Ohio Department of Education is the lead partner, the Council for Ethics in Economics is a community partner, and there are fifteen local partners who receive grant money to develop and implement different styles and formats of character education initiatives across Ohio. In July of 1999, state funding was obtained to fund 58 character education programs over a two-year period. Grants from corporations fund additional project

activities including dialogue between employers and educators about character needs in the workplace.

OPCE Management Advisory Groups have been established to identify specific character needs for employment success in the employment sectors relating to construction and development, distribution and warehousing, finance, financial integrity for clients (insurance, banking, brokerage), health and residential care, manufacturing and processing, public sector employment, retailing/real estate and sales, utilities, youth/social and community service organizations, and call centers. Detailed Management Advisory Group Reports have been generated for six of the employment sectors and include specific character education examples designed to be helpful to educators and counselors in developing the business ethical character of targeted public school students.

On September 25 and 26, 2001, OPCE presented the 3rd Annual Governor's Summit on Character Education in Columbus, Ohio. In a pre-conference workshop, participant educators were taught strategies "that help young people develop into caring, respectful, responsible individuals who make positive choices based on ethical reasoning and a well-developed sense of service, civic involvement, and philanthropy." Ohio Partners in Character Education, *The Governor's Summit on Character Education*, http://www.charactereducationohio.org/summit.htm (2001). During the actual conference, participants could choose from among breakout sessions including "Creating a Caring School Culture through Weaving Moral and Emotional Literacy into the Fabric of the School Community," "Building Character School-wide: Creating a Caring Community in Your School," and "Navigating the Heart through Character Education."

John Marshall High School, an OPCE Partner located in Cleveland, Ohio, subscribes to the following character education mission:

> The mission of the character/ethics committee of the John Marshall High School is to plan and implement ideas and activities to reinforce positive character traits in the JMHS community in order that these characteristics are understood, internalized and acted upon by all.
>
> When we at John Marshall identify persons as having "good character" we are saying that they adhere to *a set of behaviors and beliefs* which our culture commonly holds as desirable. Our goal is to produce citizens who are equipped with all the skills needed to thrive in the 21st Century. We believe this includes *knowing that which is right and good, desiring those attributes, and acting upon them.*

Ohio Partners in Character Education, *OPCE Partners*, http://www.charactereducationohio.org/partners/marshall.htm (2001) (emphasis added).

The John Marshall High School character/ethics committee works with its feeder elementary and middle schools in Cleveland to get them involved in a strong character education program. It is also working with the Rotary Club and Eveready Battery Co. to develop a character education program in every K-12 public school in the Cleveland region. *Id.* Rotary International encourages character education in public schools through the indoctrination of children in the principles of truth, justice, friendliness, and helpfulness that serve as the foundation for the Rotary 4-Way Test.[1]

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[1] The Rotary 4-Way Test challenges students to consider the following questions:

"Of the things we think say or do:

1. Is it the TRUTH?
2. Is it FAIR to all concerned?
3. Will it build GOODWILL and BETTER FRIENDSHIPS?
4. Will it be BENEFICIAL to all concerned?"

In Akron, Ohio, public school teachers indoctrinate their students in the Six Pillars of Character as developed and promoted by the Character Counts! Coalition, a project of the Josephson Institute of Ethics in Marina del Rey, California. The Six Pillars of Character include trustworthiness, respect, responsibility, fairness, caring, and citizenship.[2]

Rotary International, *The Rotary 4-Way Test*, http://www.rotary.org/aboutrotary/4way.html (2001). The presence of Rotary Club members as character educators in Ohio public schools raises the question of whether, in the absence of publicly-funded school choice, the State of Ohio must grant equal public school access to members of the Knights of Columbus for the teaching of character through the use of the Catechism of the Catholic Church.

[2] The Character Counts! Coalition attaches the following meaning to the Six Pillars of Character:

1. Trustworthiness—Be honest. Don't deceive, cheat or steal. Be reliable—do what you say you'll do. Have the courage to do the right thing. Build a good reputation. Be loyal—stand by your family, friends and country.
2. Respect—Treat others with respect; follow the Golden Rule. Be tolerant of differences. Use good manners, not bad language. Be considerate of the feelings of others. Don't threaten, hit or hurt anyone. Deal peacefully with anger, insults and disagreements.
3. Responsibility—Do what you are supposed to do. Persevere: keep on trying! Always do your best. Use self-control. Be self-disciplined. Think before you act—consider the consequences. Be accountable for your choices.
4. Fairness—Play by the rules. Take turns and share. Be open-minded; listen to others. Don't take advantage of others. Don't blame others carelessly.
5. Caring—Be kind. Be compassionate and show you care. Express gratitude. Forgive others. Help people in need.
6. Citizenship. Do your share to make your school and community better. Cooperate. Stay informed; vote. Be a good neighbor. Obey laws and rules. Respect authority. Protect the environment.

Ohio public schools in Toledo, Brook Park, Girard, Lima, Painesville, Perrysburg, Sandusky, and Stow also are members of the Character Counts! Coalition and teach the Six Pillars of Character. In some instances, the Ohio National Guard, through its Higher Ground program, assists Ohio public schools in teaching the Six Pillars of Character. Eileen Dempsey, "Building Character: Ohio National Guard instructors take message of respect to schools," *The Columbus Dispatch* (May 2, 2001).

In addition to the Council for Ethics in Economics, the Character Counts! Coalition, and Rotary Clubs, other outside organizations are granted access to Ohio public schools for the expression of their viewpoints regarding the religious concepts, motives and themes that serve as the foundation for Ohio's character education program. These private speakers include The Communitarian Network, The Character Education Partnership, and Make-A-Wish Foundation of Northeast, Central, and Southern Ohio in partnership with Partnerships Make a Difference.

Most of the outside organizations that are expressing their religious character education viewpoints in Ohio's public schools are involved in the broader character education movement that has flourished in the United States during the past ten years. Through national and regional conferences, the leaders of these organizations train educators in character education principles and practices.[3] The leaders of the Ohio

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Character Counts! Coalition, *The Six Pillars of Character*, http://www.charactercounts.org/defsix.htm (2001).

[3] The Washington, D.C.-based Character Education Partnership promotes the following Elever Principles of Effective Character Education:

1. Character education promotes core ethical values as the basis of good character.
2. "Character" must be comprehensively defined to include thinking, feeling, and behavior.

and national character education movements recognize that "Education in its fullest sense is inescapably a moral enterprise—a continuous and conscious effort to guide students to know and pursue what is good and what is worthwhile." Center for the Advancement of Ethics and Character, *Character Education Manifesto* (1996).

After being indoctrinated in state-approved character traits through classroom instruction and role-playing, Ohio public school students are required to participate in service projects in their local communities. These service projects are designed to "provide structured time for students to reflect on their experiences" and to "help foster the development of a

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3. Effective character education requires an intentional, proactive, and comprehensive approach that promotes the core values in all phases of school life.
4. The school must be a caring community.
5. To develop character, students need opportunities for moral action.
6. Effective character education includes a meaningful and challenging academic curriculum that respects all learners and helps them succeed.
7. Character education should strive to develop students' intrinsic motivation.
8. The school staff must become a learning and moral community in which all share responsibility for character education and attempt to adhere to the same core values that guide the education of students.
9. Character education requires moral leadership from both staff and students.
10. The school must recruit parents and community members as full partners in the character-building effort.
11. Evaluation of character education should assess the character of the school, the school staff's functioning as character educators, and the extent to which students manifest good character.

Character Education Partnership, *Eleven Principles of Effective Character Education*, http://web541ba.ntx.net/principles/index.cgi (2001).

sense of caring for others." Ohio Department of Education, *About Learn & Serve Ohio*, http://www.ohiok-16service.org/odeabout.htm (2001). The Ohio Department of Education awards Learn and Serve America (Ohio) grants on a competitive basis to local public school districts that provide service-learning opportunities to K-12 students.

Ohio law permits any public school district board of education to include community service education in the educational program of the district by adopting a resolution to that effect. Participating public school districts establish community service advisory committees the members of which may include representatives of parents, teachers, administrators, other educational institutions, business, government, nonprofit organizations, veterans organizations, social service organizations, religious organizations, and philanthropies. The participating school districts and their community service advisory committees develop and implement a community service plan for students. The community service plan educates students in the value of community service, identifies opportunities for students to provide community service, encourages students to provide community service, and integrates community service opportunities into the curriculum. Ohio Rev. Code § 3313.60.5(B).

In April of 1996, leaders of the national character education and service learning movements participated in a conference at Racine, Wisconsin "to identify the key elements and most effective models of both movements and to develop new collaborations between the two movements to enhance the work of both." Institute for Global Ethics, *Report from Wingspread*, 2 (1996). The resulting conference report explained that there was a sense of urgency "to ameliorate the rapidly deteriorating situation in many of America's schools and communities." *Id.* at 3. It was the view of these character education and service learning

professionals "that today the real and lasting questions are about survival." *Id.*

To "ameliorate the rapidly deteriorating situation," Ohio education officials have decided to embrace character education and service learning models that have long been an integral part of the curriculum in private religious schools, especially those operated by the Catholic Church. Ohio public schools have been transformed into publicly-funded replicas of the very parochial school communities that continue to be denied equal access to public education funds because their approach is too religious for education officials and, apparently, the Sixth Circuit.

This Court disagrees with those who would maintain "that something that is 'quintessentially religious' or 'decidedly religious' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint." *Good News Club*, 533 U.S. at ___, 121 S.Ct. at 2102. In fact, the character education virtues taught in Ohio's public schools (i.e., truthfulness, trustworthiness, respect, responsibility, fairness, caring, and citizenship) are more "quintessentially religious" in nature than the character traits of teamwork, loyalty, or patriotism which this Court has equated in kind to Christian moral and character education traits. *Id.* The habits of the heart taught in Ohio's public schools involve issues of self-examination, self-regulation, self-sacrifice, and love of neighbor that go to the very core of what it means to be a Christian.

The scholarships offered to low-income parents under the Program, far from creating "illusory" choices regarding the education of their children, provide the only means available to these families for escaping from the coercive effect of a monopolistic public education funding policy that establishes a civic religion in Ohio's public schools.

B. The Religious Concepts, Motives, and Themes Taught in Ohio Public Schools Are Similar to Those Promoted in Nineteenth-Century France in an Attempt to Eliminate the Role of the Catholic Church in Providing for the Moral Education of Children.

The rejection of Catholic educational authority that accompanied the French Revolution opened the door for a strictly scientific educational philosophy that rejected the notion of an ideal moral code that could serve as the basis for social organization. By the end of the first quarter of the nineteenth century, unstable social conditions in France caused many leaders to realize that a strictly scientific education could not build the social solidarity that was necessary to support a liberal republican political system.

One of the world's first social scientists, Henri de Saint-Simon (1760-1825), recognized late in his career the threat that a purely scientific education posed to social solidarity. Yet, Saint-Simon was convinced that historic Christianity had run its course and would be unable to adapt itself to the needs of the new, technologically advanced society. During the last two years of his life, up until his final hours, Saint-Simon developed and espoused a New Christianity that could be used to establish social order and fraternity.

In Saint-Simon's view, all that is divine in Christianity could be reduced to the single principle that men "should organize their community in a way which will be most advantageous to the greatest number; they should make it their aim in all their undertakings and actions to promote as quickly and completely as possible the moral and physical welfare of the most numerous class." Henri de Saint-Simon, "New Christianity" (1825), in Felix Markham (ed.), *Social Organization, the Science of Man and Other Writings*, 83 (1964).

Orestes Brownson, a nineteenth-century Catholic political philosopher, gave an early warning about social scientists like Saint-Simon who, in Brownson's opinion, believed that:

> The Christian symbol needs a new and more Catholic interpretation, adapted to our stage in universal progress. Where the old interpretation uses the words God, Church, and Heaven, you must understand Humanity, Society, and Earth; you will then have the true Christian idea, and bring the Gospel down to the order of nature and within the scope of human reason.

Orestes Brownson, "Socialism and the Church" (1849), in Orestes Brownson, *Essays and Reviews*, 479 (1852).

In the view of the so-called Saint-Simonian cult members that survived Saint-Simon, the faculty of feeling should be developed in equal proportion to the rational faculty. In their opinion, "those sympathies that unite man with his fellowmen and that make him suffer their sorrows, enjoy their joys, and live their lives" prevent societies from becoming "aggregations of individuals without bonds, having no motive for their actions but the impulses of egoism." Georg Iggers (trans.), *The Doctrine of Saint-Simon: An Exposition, First Year, 1828-1829*, 154 (1958). For this reason, moral education was to "be the object of a social plan and of a political function." *Id.* at 149.

Auguste Comte (1798-1857), a former secretary to Saint-Simon, created a new "religion of humanity." Comte was, at first, a "positivist" whose initial goal was to establish a philosophy of science that would provide the basis for a scientific reordering of society. Late in his life, Comte's positivist theory evolved into a positivist religion. In the future, Comte affirmed, "science, poetry and morality will be consecrated to the study, praise and love of humanity and our life will thus become a continuous act of worship." D. G. Charlton, *France*, 264 (1972).

Comte believed his religious ethic based on the love of mankind would cure the self-centeredness of men in his era. This would occur "with the help of a didactic art and literature, the beneficent moral influence of women, a political reorganization in which duties will take the place of rights, and above all the impact of a newly organized Church of Humanity." *Id.* Comte proposed replacing the Christian calendar with months and saints' days named after great men like Aristotle and Archimedes and starting from 1789, the date of the French Revolution. See Auguste Comte, *The Catechism of Positive Religion*, Table "D" (1858).

Later in the nineteenth century, Jules Ferry, a French republican politician and positivist, proposed legislation that would make primary education obligatory and would replace the mandatory "religious and moral" instruction for primary school children with a requirement that students should learn "moral and civic" duties. Conservatives in the French Senate who were concerned about a state-sponsored "atheistic Christianity" asked Jules Ferry to amend his legislative proposal by specifying in the law that schoolchildren be taught a "religious morality." Ferry refused. Jules Simon, the moderate republican author of *La Religion Naturelle*, advocated an amendment that would require teachers to at least teach children their "duties toward God and country." On March 28, 1882, the French Senate passed the Obligatory Primary Education law, without Jules Simon's amendment. Philip Bertocci, *Jules Simon*, 204-205 (1978).

The Obligatory Primary Education law paved the way for the introduction of secular morality, called *morale laïque*, in France's national schools. In July of 1899, a *Société de l'éducation sociale* was formed in France to conduct "research into the proper means to produce, not only the virtuous person, the good citizen, but the veritable social being." Phyllis Stock-Morton, *Moral Education for a Secular Society*, 117 (1988). The virtue of "solidarity" was viewed as

the new moral attitude that offered a middle way between classical individualism and collective socialism. "There is between each individual and all others a necessary bond of solidarity; only the exact study of the causes, conditions, and limits of that solidarity would produce a standard of the rights and duties of each to all and all to each, and would insure scientific and moral conclusions to the social problem." Léon Bourgeois, *Solidarité*, 15 (1912).

The role of public education is to facilitate the building of *authentic* solidarity through voluntary education associations, not to impose an *artificial* solidarity through compulsory public school character education and service learning programs.

C. The State of Ohio is Indoctrinating Children in a Secular Morality Rather Than Promoting a Sacred Pluralism That Protects the Fundamental Right of Parents to Educate Their Children in the Religious Concepts, Motives, and Themes of Their Choice.

America, with its due regard for life, liberty, and the pursuit of happiness, shares the historic French concern for social solidarity through liberty, equality, and fraternity. This Court has acknowledged that "if common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced." *Lee*, 505 U.S. at 589-590. Nevertheless, this Court has rejected "the suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." *Id.* at 590.

An examination of social trends in France and the United States over the past 200 years reveals Six Phases of Demo-

cratic Evolution.[4] Each of these two nations has experienced the first three phases of democratic evolution: a *skeptical phase* where the institutional authority of organized religions is questioned and rejected; a *social scientific* phase where spontaneous, voluntary associations are rejected in favor of social planning by social scientists and government officials; and a *social degenerative* phase where moral norms and social responsibility are rejected by an increasingly isolated citizenry that is unable to understand or cope with the social and economic impact of rapid technological and material advances. It is in response to the social degenerative phase that democracies must choose between socialism and solidarity.

France addressed its social degeneration by entering into a state-imposed *secular moralistic* phase. In this phase, the government attempts to create artificial social solidarity by indoctrinating citizens in core civic virtues. France then entered into a *social submissive* phase where citizens who have been indoctrinated in the civic religion cede effective control over their lives and destinies to the civil service agencies of the State. France has come to rest in its present *socialistic* phase where the State machinery reigns supreme.

Jacques Maritain, a French-Catholic philosopher and first-hand witness to the secular moralistic and social submissive phases in France, maintained that "both the essence and freedom of education would be ruined" where the state annexes the education task "in order to compensate for all the

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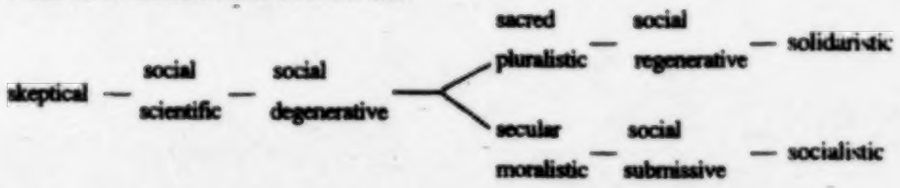
[4] The following diagram sets forth the two possible paths of the Six Phases of Democratic Evolution:



James Kelly, *Six Phases of Democratic Evolution* (2001).

deficiencies in civil society, to turn out in a hurry the type fitted to the immediate needs of the political power." Jacques Maritain, *Education at the Crossroads*, 100 (1943).

Through the national character education and service learning movements, the United States is following France's path into the *secular moralistic* phase. Ohio public school educators, in cooperation with economic forecasters, business leaders, and politicians, have constructed and implemented a social plan that indoctrinates children in state-endorsed opinions regarding how children should relate to and care for their fellow students, teachers, eventual employers and co-workers, and members of society-at-large. Such indoctrination runs contrary to this Court's holding that "in our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969).

There is a better way. To address social degeneration, the United States should re-affirm its belief in a *sacred pluralistic* phase that rejects a state-sponsored secular morality in favor of government respect for and promotion of the independent, private decisions of parents regarding the moral education of their children. This would lead to the *social regenerative* phase during which society would be strengthened through the myriad of meaningful voluntary associations that lead to the *solidaristic* phase.

"If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads." Alexis de Tocqueville, *Democracy in America*, vol. 2, part 2, chap. 5, p. 517 (1968 ed.). Tocqueville believed that equality of conditions (eg., employment, healthcare, food, housing) produces isolated individuals who have been relieved of the need for communal undertakings. The resulting social apathy and

class-consciousness create a compulsive drive for a state-enforced unity. On the other hand, associations draw citizens together and counter the logic of a top-down unity that sacrifices individual freedom. See Joshua Mitchell, *The Fragility of Freedom*, 229 (1995).

As did France at the end of the nineteenth century, the State of Ohio has entered the *secular moralistic* phase of democratic evolution and is moving toward the *socialistic* phase. Whether they are called New Christianity, Religion of Humanity, *Morale Laïque*, the Six Pillars of Character, or the 4-Way Test, the religious concepts, motives, and themes taught in Ohio public schools are no different in kind than those taught in Catholic or other private religious schools that participate in the Program. To avoid impermissible view-point discrimination and the establishment of a civic religion, the State of Ohio must shift course and enter the *sacred pluralistic* phase to facilitate a move toward authentic solidarity.

II. THE STATE OF OHIO ENGAGES IN VIEW-POINT DISCRIMINATION THAT COMPELS CHILDREN TO SUBSCRIBE TO AND PARTICIPATE IN RELIGIOUS CONCEPTS, MOTIVES, AND THEMES IN A MANNER THAT ESTABLISHES A CIVIC RELIGION.

As the primary educators of their children, parents are responsible for making sure that their children have the knowledge and moral fiber to become law-abiding, self-sustaining citizens. However, parents have the additional obligation to educate their children to think critically about social and political matters and, when appropriate, to challenge the status quo. "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and to prepare him for additional obligations." *Pierce v. Society of the Sisters*, 268 U.S 510, 535 (1925).

The Ohio Constitution directs the Ohio General Assembly to encourage schools and the means of instruction as a way of helping parents fulfill their role as the primary religious, moral, and academic educators of their children:

> Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Ohio Constitution, § 1.07, *Rights of conscience; education; the necessity of religion and knowledge* (1851).

The State of Ohio compels parents having children between the ages of six and eighteen years of age to send them to a public school or to cause them to be instructed in a school which conforms to the minimum standards prescribed by the state board of education. Ohio Rev. Code § 3321.03.

Ohio law requires each board of education within a public school district to implement a competency-based education program for citizenship in grades one through twelve. Ohio Rev. Code § 3301.07.15. This citizenship education program involves teaching in the areas of *civic knowledge* (i.e., political parties and candidates, separation of powers, economic systems, and the legislative process) and *civic skills* (i.e., civic involvement, evaluating officials and issues, and issue advocacy). Through character education and service learning, the State of Ohio has expanded the citizenship education program to include the teaching of *civic virtues* (i.e., truthfulness, trustworthiness, respect, responsibility, fairness, caring, and citizenship).

The desire of a state legislature "to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate." *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). However, the

means adopted may not "exceed the limitations upon the power of the state." *Id.*

A. The State of Ohio Has Created a Limited Public Forum for the Expression of Religious Concepts, Motives, and Themes Relating to the Moral Education of Children.

By mandating, funding, and implementing the teaching of civic virtues in its public schools, the State of Ohio has created a limited public forum for the expression of religious concepts, motives, and themes relating to the moral education of children. The public school classroom or building is not the forum; the forum is the marketplace of educational discourse that is created when the State of Ohio mandates and funds the pursuit by parents of a minimum level of moral education for their children.

This public education forum created by the State of Ohio is "a forum more in a metaphysical than a spatial or geographic sense, but the same principles are applicable." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 830 (1995). In *Rosenberger*, a limited public forum was created by the University of Virginia's establishment and governance of a student activity fund to support a broad range of extracurricular activities that were related to the educational purpose of the University. The student activity funds were expended "to encourage a diversity of views from private speakers." *Id.* at 834. Similarly, the State of Ohio expends funds to encourage a diversity of views from private speakers, including students, parents, teachers, and community leaders, on the subject matter of the moral education of children for democratic participation.

Even if the purpose of the public education forum funded by the State of Ohio is not to encourage a diversity of views, the salient point is that, like the program in *Rosenberger*, the Ohio public education forum "is designed to facilitate private

speech, not to promote a governmental message." *Legal Services Corporation v. Velazquez*, 531 U.S. ___, 121 S.Ct. 1043, 1049 (2001). Ohio public school teachers speak to students on behalf of their parents and the broader community about religious concepts, motives, and themes relating to the moral education of children. This is comparable to the role of a government-subsidized attorney who "speaks on behalf of the client in a claim against the government for welfare benefits." *Id.*

The Ohio public education forum is a public forum, not a nonpublic forum for government speech. By funding public education, the State of Ohio itself is not the speaker, see *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235 (2000), nor is the State of Ohio using private speakers to transmit information pertaining to its own program, see *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Rosenberger*, 515 U.S. at 833.

Even if the State of Ohio is transmitting a government message regarding the moral education of children, it may not do so in a manner that imposes "a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). Such a disproportionate burden occurs when the government uses its control over a specific message i) to undermine "traditional political controls to ensure responsible government action," *Board of Regents of Univ. of Wis. System*, 529 U.S. at 229 or ii) to suppress "ideas thought inimical to the Government's own interest," *Legal Services Corp.*, 531 U.S. at ___, 121 S.Ct. at 1052 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983); *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).

In the present case, if the State of Ohio is speaking, the very purpose of its message is to indoctrinate children in civic

virtues that serve as the foundation for the democratic deliberation skills used to consider the merit of policies or ideas advanced by state and local elected officials. By coercing families to send their children to tuition-free public schools, the State of Ohio increases the chances that the political views of its future citizens will be rooted in the State's moral education orthodoxy. Such coercion makes it less likely that Ohio officials will be "accountable to the electorate and the political process for its advocacy" of policies or ideas that, in previous generations, may have conflicted with the peaceful religious convictions of many citizens. *Board of Regents of Univ. of Wis. System*, 529 U.S. at 235.

Secondly, the State of Ohio may not use its subjective criteria to deny public education funds to parents on the grounds that their Christian viewpoints constitute "dangerous" ideas deserving of suppression. See *Speiser*, 357 U.S. at 519. To the contrary, recent data indicates that private schools are at least as capable as public schools of producing good citizens and that the provision of public funds to parents for the education of children at private schools may strengthen democratic values. Jay Greene, "Civic Values in Public and Private Schools," *Learning From School Choice*, Paul Peterson and Bryan Hassel (eds.), 83-84 (1998).

Ultimately, the compulsory nature of the Ohio public education forum dictates its classification as a public, not a nonpublic, forum. Parents have a natural duty to speak privately to their children about religious concepts, motives, and themes relating to moral behavior. By compelling school attendance between the ages of six and eighteen and exclusively funding public schools, the State of Ohio should not be permitted to convert private speech between parents and their children into government speech.

B. By Funding Only Religious Concepts, Motives, and Themes Taught in Public Schools, the State of Ohio Engages in Viewpoint Discrimination.

Although the character education and service learning programs taught at private religious schools fall within the limits of the public forum created for the moral education of children, the State of Ohio refuses to provide public funds for the viewpoints (i.e., religious concepts, motives, and themes) taught pursuant to such programs. This Court recently rejected this form of viewpoint discrimination. "What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the [after-school youth] Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Good News Club*, 533 U.S. at ___, 121 S.Ct. at 2102.

This Court has rejected the reasoning that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. It likewise has rejected the conclusion that relying on Christian principles "taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Id.*

Ohio parents who desire to secure a moral education for their children in accordance with the religious concepts, motives, and themes taught at private religious schools must pay private school tuition. This Court has determined "that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828 (citing *Simon & Schuster, Inc.*, 502 U.S. at 115). The financial burden of having to pay private school tuition for the privilege of opting-out of the moral education viewpoints funded by the State of Ohio coerces many parents into enrolling their children in public schools. This is especially

the case with respect to low-income families who do not have the financial means to make such tuition payments.

C. By Engaging in Impermissible Viewpoint Discrimination, the State of Ohio Compels Children to Subscribe to and Participate in Religious Concepts, Motives, and Themes in a Manner That Establishes a Civic Religion.

Unlike the voluntary nature of the educational decision confronting parents in the *Good News Club* case whether to enroll their children in after-school youth programs, Ohio parents are required by law to secure an adequate education, including a moral education, for their children. If this Court requires public school officials to provide equal access to prevent viewpoint discrimination as to *voluntary* decisions regarding after-school moral education, then Ohio public education funding must be structured in a way that does not discriminate against moral education decisions that parents are *compelled* to make under state law.

The Ohio General Assembly has a duty to encourage schools and the means of instruction in order to promote the religion, morality, and knowledge that is essential to good government. "However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

Thus, in *Wooley*, this Court determined that it was unconstitutional for the state of New Hampshire to require objecting citizens to participate in the dissemination of the ideological message "Live Free or Die" contained on non-commercial vehicle license plates. This Court refused to uphold "a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view that he finds unacceptable." *Id.* at 715.

Impressionable public schoolchildren are at great risk of being coerced into becoming a courier for a State ideology. "Perhaps no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641 (1943).

Thus, in *Barnette*, this Court ruled that it was unconstitutional for the State of West Virginia to require Jehovah Witnesses schoolchildren to participate in a brief ceremony at the start of each school day during which they pledged allegiance to the American flag. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

In several ways, the Ohio character education program is a step beyond *Wooley* and *Barnette* in its potential for compelling adherence by schoolchildren to a State ideology that is contrary to their religious viewpoints and right to self-determination.

First, unlike the passive participation by drivers in the ideological message in *Wooley* or the momentary pledge of allegiance by students in *Barnette*, students in Ohio public schools are required to actively participate throughout the school day in an ideologically-driven moral code. All notions of liberty and justice for all would be offended by an interpretation of our Constitution that would make it constitutional to indoctrinate students throughout a school day in the democratic values embodied by the very American flag to which school officials cannot force students to momentarily pledge allegiance.

Second, the religious concepts, motives, and themes contained in the Ohio character education program have been developed by curricular specialists, guidance counselors, and business leaders to maintain social control and to shape the attitudes of the next generation of workers. "But Man is not an insect. Nothing is more pathetic than the total and blind devotion of an ant to its ant-hill; and to us nothing could be more deplorable." Pierre Teilhard de Chardin, "The Grand Option" (1939) in Norman Denny (Trans.), *The Future of Man*, 40 (1964).

Lastly, the State of Ohio compels students and their families who cannot afford tuition at the private religious schools of their choice to participate in public school religious instruction, community service projects, and school-wide celebrations that resemble the activities of a full-fledged parish community or civic organization.

The Ohio public school monopoly over the moral education of children fulfills the prediction of Catholic philosopher Christopher Dawson:

> The new State will be universal and omnicompetent. It will mold the mind and guide the life of its citizens from the cradle to the grave. It will not tolerate any interference with its educational functions by any sectarian organization, even though the latter is based on religious convictions. And this is the more serious, since the introduction of psychology into education has made the schoolmaster a spiritual guide as well as a trainer of the mind. In fact it seems as though the school of the future must increasingly usurp the functions that the Church exercised in the past, and that the teaching profession will take the place of the clergy as the spiritual power of the future.

Christopher Dawson, *Religion and the Modern State*, 55 (1935).

By using taxpayer funds in support of religious character education in its public schools, the State of Ohio has right-

fully embraced its constitutional duty to encourage schools and means of instruction that will promote religion, morality, and knowledge. However, the unconstitutional establishment of a civic religion in Ohio cannot stand. "A claim that the coercive use of force in matters of opinion can be justified seems not only dangerous in itself, but a complete contradiction to the implications of the idea of the human person." Gabriel Marcel, *Men Against Humanity*, 181 (1952).

Every human person is faced with the original and eternal choice of whether to follow or reject God. The defining role of a democratic government is to protect and promote the right of its citizens to make that choice. A democratic government should not force children to choose God; nor should it force children to ignore God by compelling their education in values-free public schools; nor should it force children to replace God by compelling them to participate in a secular civic religion in public schools. "In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience." Vatican Council II, *Dignitatis Humanae*, (Declaration on Religious Freedom) § 3 (1965).

The State of Ohio must fund public education in a manner that equally respects all peaceful religious concepts, motives, and themes relating to the moral education of children, whether they are taught in public or private schools. "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839 (citing *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 704 (1994) (SOUTER, J.); *Witters*, 474 U.S. at 487-488; *Mueller v. Allen*, 463 U.S. 388, 398-399 (1983); *Widmar v. Vincent*, 454 U.S. 263, 274-275 (1981)).

A neutral public education funding policy that extends benefits to parents regardless of whether they secure a moral education for their children in public or private schools will require a fundamental shift in the present allocation of public funds. Nevertheless, the State of Ohio "cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Rosenberger*, 515 U.S. at 835. It is incumbent on the State of Ohio "to ration or allocate the scarce resources on some acceptable neutral principle." *Id.*

The Program's voucher system is a constitutional means of allocating public education resources in a way that avoids penalizing private school parents for subscribing to moral education viewpoints that are no different in kind than those which comprise the civic religion taught in Ohio's public schools.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be reversed. This case should be remanded to the applicable federal trial court for a determination as to whether the State of Ohio has created a public forum for the teaching of religious concepts, motives, and themes relating to the moral education of children. If so, the lower trial court then should determine whether the eligibility for and amount of the scholarships offered under the Program should be expanded in order to prevent impermissible viewpoint discrimination and the establishment of a civic religion in Ohio public schools.

Respectfully submitted,

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